

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

**NUTRITIONAL MANAGEMENT SERVICES,
INC.**

Employer

and

Case 29-RC-272399

**1199 SEIU UNITED HEALTHCARE WORKERS
EAST**

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer, Nutrition Management Services, Inc., provides nutritional management services to healthcare and educational facilities, including Beach Gardens Rehabilitation and Nursing Center, located at 1711 Brookhaven Avenue, Far Rockaway, New York. On February 5, 2021¹, 1199 SEIU United Healthcare Workers East (the Petitioner) filed a representation petition with the National Labor Relations Board (the Board) under Section 9(c) of the National Labor Relations Act (the Act). Petitioner seeks to represent a unit of approximately 13 employees at the Beach Gardens facility. The Employer asserts that some employees in the petitioned-for unit are statutory supervisors.

On March 2, Hearing Officer Marcia E. Adams conducted the hearing in this matter by videoconference, during which the parties were invited to present their positions and supporting evidence. Neither party wished to make concluding remarks on the record or to submit a post-hearing brief.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the entire record in this proceeding and consistent with relevant Board law, I find that the Employer has not met its burden to demonstrate that any employees in the petitioned-for unit are statutory supervisors and should therefore be excluded from the bargaining unit. Since both parties agree that, because the location involved herein is a COVID-19 nursing facility, a manual ballot election cannot be safely conducted, I am directing a mail ballot election.

Issue Presented

The petitioner initially sought to represent the following unit:

All full time and regular part time and per diem² Dietary Aides, Cook I, Cook II, Dietary Porters, Cooks, Helpers and Pot Washers employed at the 1711 Brookhaven Avenue location but excluding all confidential employees, managers, guards and supervisors as defined in the Act.

¹ All dates herein are 2021 unless otherwise specified.

² The Employer did not object to the inclusion of per diem employees and their inclusion or exclusion was not addressed in the record. I shall therefore continue to include them in the unit.

Testimony revealed that the Employer does not use some of the designations and titles set forth in the Petitioner's unit description. The only job titles used are Cook, Dietary Aide, and Food Service/Utility Worker. The Employer initially sought to exclude Cooks from the unit and to specifically exclude the titles Cook Supervisor and Food Service Supervisor as well, contending that they were statutory supervisors within the meaning of the Act. The Employer also asserted that Cooks did not share the requisite community of interest with employees in the petitioned-for unit.

Prior to the opening of the hearing, the parties stipulated that Food Service Manager³ Eunice Marcelino is a supervisor within the meaning of Section 2(11) of the Act and should be excluded from the unit. Moreover, during the course of the hearing, the Employer changed its position regarding the Cooks and agreed that they should be included in the unit.

With the inclusion of Cooks and the exclusion of the Food Service Manager, the only remaining issue is whether two employees, Onique Simpson and Renford Taylor, are statutory supervisors who should be excluded from the Unit. The Employer contends that Simpson is a Cook Supervisor and that Roberts is a Food Service/Utility Supervisor.

Facts

Employer's Evidence

The Employer provides contracted food services to healthcare facilities and educational institutions. Executive Vice President Joseph Roberts testified that when the Employer gets a contract at a new facility, it generally hires some or all of the dietary employees who were already employed at the facility. When the Employer began operations at the Beach Gardens facility on May 18, 2020, it hired all existing staff. All hourly employees initially retained their previous titles, duties and rates of pay.

Roberts estimates that he has visited the Beach Gardens facility about five or six times since the Employer began operations there. Area Manager Shawn Carvajal reports to him and is responsible for an undisclosed number of other locations as well. Food Service Manager Eunice Marcelino works at the facility and is responsible for its daily operations.

Since the Employer began operations, the number of residents has varied from as many as 145 to as low as 90. There are currently around 106 residents. Roberts testified that, in the fall of 2020, the Employer could not afford a second full-time manager.⁴ They decided that they would operate with one manager and two supervisors and "promoted two individuals in the fall to the supervisor function." Roberts described the positions as "working supervisors" in that both employees continued to perform their prior duties along with new supervisory duties. As discussed herein, Taylor and Simpson were both given a \$1 per hour raise at some point in late 2020. Roberts did not know who informed the employees that they were getting the raise or

³ The Food Service Manager is sometimes referred to in the record as the Food Service Director.

⁴ It is unclear from the record whether there was ever a second manager at the facility.

what, exactly, they were told. Roberts noted that both employees were still in their probationary periods at the time.

The Employer submitted job descriptions for a Chef/AM Supervisor, which shows that it was last updated in June 2008, and a Chef/PM Supervisor, last updated in February 1996. Although Roberts testified that the descriptions were in keeping with the duties that Simpson and Taylor perform at Beach Gardens, there is no evidence that these job descriptions were used or applied at the facility or that the descriptions were ever shown to or discussed with Taylor and Simpson.

Roberts testified about two duties listed in the job descriptions: maintaining the daily production log and preparing the “needs list.” The production log is a document that shows how many portions of each type of food are to be prepared each day, how many portions were actually made and how any differences in what was required and what was produced were accounted for. The needs list is, in effect, a grocery list that shows what food needs to be ordered for the following week. The needs list is given to the Food Service Manager, who orders the food. Roberts testified that the Cook Supervisor maintains the production log and creates the needs list “independent of the Food Service Manager.”

According to the job descriptions, the Chef/AM Supervisor is responsible for opening the kitchen and the Chef/PM Supervisor is responsible for closing. Roberts explained that nursing home kitchens operate seven days a week so the kitchen must be opened seven times and closed seven times each week. At Beach Gardens, the kitchen is open from 6 a.m. to 7 p.m. Food Service Manager Marcelino works five days a week. On each of those days, she either opens or closes the kitchen. This means that the kitchen either opens or closes nine times during the week when Marcelino is not there. Roberts testified that those nine opens/closes need to be “covered” and that the purported supervisors were responsible for opening or closing the kitchen when Marcelino is not there.

Roberts testified about a number of duties that the supervisors were “expected” to perform when the Food Service Manager is not there, including assigning tasks or “shifting” employees around when someone is out, handling grievances between employees or complaints from facility staff or residents about the food, directing employees to stay late when needed and taking disciplinary actions. However, any disciplinary action other than a verbal warning or first written warning must be approved and handled by the Employer’s Human Resources department. There is no record evidence of where Human Resources is located.

Roberts also testified that, if an employee was going to be out, he or she would be “expected” to call in to the supervisor on duty, which would include Taylor or Simpson if Marcelino was not there. Some personnel matters, such as raises and vacations, are not handled on site and must be reviewed and approved by the Area Manager or by Human Resources. While a manager or supervisor can make a recommendation for a pay raise, such requests must be submitted to the corporate office and approved by the client because they ultimately pay for the services.

Since the Employer began operations at Beach Gardens, no employees have been disciplined and no performance reviews have been conducted. Two employees have been terminated. The first employee was discharged because he was going to be out of work for 30 days during the holidays. Area Manager Carvajal handled that termination. The other employee was not supposed to be on the premises without a COVID test but refused to leave. Roberts terminated that employee. One new cook was hired and neither of the two purported supervisors were involved. Roberts testified that the hiring process was “abbreviated” because the Employer was short-handed and needed to bring someone on quickly. Carvajal made the final decision to hire the new employee.

Roberts was asked to give specific examples of situations in which Simpson and Taylor have exercised independent judgement. He could not cite any past, specific examples. Rather, he described a hypothetical situation in which the cook supervisor discovered that cabbage was supposed to be on the menu that day, but the cabbage turned out to be rotten. Roberts testified that, in such a situation, the cook supervisor would decide on an alternative to prepare and serve.

Petitioner's Evidence

Onique Simpson has been a cook at Beach Gardens for five years. The name badge he was wearing at the hearing shows his title as Cook. Sometime in late 2020, he received a \$1 per hour raise for “good work and seniority.” He testified that no one ever told him he was to become a supervisor. Simpson testified that he has never disciplined, hired, suspended, laid off, promoted, discharged or rewarded an employee and was never told he had the authority to do those things. He doesn't assign people or tell them where they should work or what tasks to perform and he does not tell people they need to stay late. If someone calls out, he does not direct other employees to cover that employee's duties. Rather, if someone doesn't report for work, all the other employees have to divide and perform the work.

Simpson works five days a week, usually from 6:00 or 6:15 a.m. to 2 p.m. He sometimes works the 11 a.m. to 7 p.m. shift on the weekends. He cannot work the morning shift on the weekends because of the train schedule. When he works mornings, he does not open the kitchen. He testified that Marcelino, “the supervisor,” opens the kitchen. Simpson testified that when Marcelino opens the kitchen, she hands out the daily production sheets to the Dietary Aides so that they know what goes on their carts. He also receives a production sheet that shows what food he needs to prepare. Marcelino has to print out the production sheets from the computer. If she is not going to be there, she prints them in advance. Simpson does not have access to the computer used to prepare the production sheets nor does he prepare any list of food that needs to be ordered.

When Simpson works the evening shift, he is only responsible for closing down his own station, not the entire kitchen. He testified that each employee is responsible for certain shutdown tasks. For example, Simpson wipes down his area and shuts down his ovens. The Dietary Aides have to make sure their areas are sanitized, while other employees must shut down certain machines. Each employee can leave when their shutdown tasks are complete, and no one is designated to be the last person out. The door locks automatically so no one has to lock up the kitchen when they leave. Because the door locks from the inside every time it closes, all employees have a key to the kitchen.

Simpson testified that he has no authority to change what he is going to cook. If, for some reason, he cannot prepare something on his production sheet, he would have to contact Marcelino. She would then have to go into the computer to “change the whole system” in order to alter the approved menu and generate a new production sheet. If Marcelino were not available, he would contact Carvajal. He would also need to contact Marcelino or Carvajal if a resident or staff member had a special request or a complaint. Simpson stated that he cannot do anything to solve a problem or respond to a request without permission.

Contact information for Marcelino and Carvajal is posted on the bulletin board in the kitchen. If an employee is unable to work when scheduled, they are to first contact Marcelino. If she is not available, they are to call and/or text Carvajal. Simpson testified that employees do not contact him if they are going to be out.

Renford Taylor has worked at Beach Gardens for over five years and was hired by the Employer in May 2020. The name badge he was wearing at the hearing shows his title as Dietary Aide. Although his duties have not changed, his title was Porter when he worked directly for Beach Gardens. Taylor has never seen or been given a job description for his position but his duties include washing dishes, cleaning floors, bringing in food and other items that are delivered, taking food carts upstairs to the resident areas and bringing them back down to the kitchen.

Taylor testified that he was never given a promotion or told that he was a supervisor, but he did receive a \$1 per hour raise for his “hard work through the years.” The record suggests that this raise was granted at the end of 2020. He has never hired, transferred, suspended, laid off, recalled, promoted, discharged, rewarded, disciplined or assigned another employee, nor has he ever resolved a dispute between two employees. Taylor testified that Marcelino is his supervisor and that “she controls the whole kitchen.”

Taylor works from 6:30 a.m. to 2:00 p.m. By the time he gets to work, the kitchen is already open. He performs the same tasks in the morning that he performed before the Employer took over. Among other things, he puts the floor mats down, starts the coffee machine, sets the dishwasher to the appropriate temperature, and begins taking things up to the resident areas and bringing things back down to the kitchen.

If a delivery comes in late, Marcelino might ask Taylor to stay a half hour late to finish, but he could not decide on his own to stay late. If Marcelino was not around to direct him to stay late, another Dietary Aide who works from 11:15 a.m. to 7 p.m. would handle the matter. Taylor cannot direct another employee to stay late. Like Simpson, Taylor does not have access to the computer that Marcelino uses. He reports to Marcelino if he is going to be late or absent or, if she is not there, he calls and/or texts Carvajal.

Board Law

Section 2(11) of the Act defines a "supervisor" as any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but

requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985). The Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied the rights protected under the Act. See *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997); *Hydro Conduit Corp.*, 254 NLR 433, 437 (1981).

The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001). Any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). Supervisory status must be proved by a preponderance of the evidence, and this requires detailed, specific evidence. *Veolia Transportation*, 363 NLRB No. 188, slip op. at 7 fn. 19 (2016); *G4S Regulated Security Solutions*, 362 NLRB No. 134 (2015). Conclusory statements without supporting evidence do not establish supervisory authority. *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Austal USA, L.L.C.*, 349 NLRB 561, 561 fn. 6 (2007); *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Supervisory status is not established where the record evidence is “in conflict or otherwise inconclusive.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Analysis and Conclusion

The record is clear that neither Simpson nor Taylor perform or have the authority to perform any of the 12 enumerated supervisory functions. Their job duties have remained unchanged since before the Employer took over operations at Beach Gardens. More significantly, those duties remained the same after Simpson and Taylor were granted a \$1 raise sometime in late 2020.

The Employer asserts that Simpson and Taylor are sometimes responsible for opening or closing the kitchen. Even if that alone could be considered a supervisory function, which it is not, their work schedules demonstrate that they could not in fact be responsible for those duties. Taylor does not report until 6:30 a.m., after the kitchen is already open, and he never works the evening shift, when the kitchen closes. Simpson also usually arrives after the kitchen is open and only works the evening shift on the weekends. When he is present for closing, he is only responsible for closing down his own station. As noted, the kitchen locks automatically from the inside so no one is responsible for officially locking it up. Further, every employee has a key to the kitchen so employees can all admit themselves when they report to work.

Roberts implied, because it is set forth in the job descriptions the Employer submitted, that the cook supervisor, presumably Simpson, is responsible for generating the daily production log. He also testified that Simpson would have the authority to make substitutions on the menu. It is clear that Simpson does not and cannot perform these functions because he does not have access to the computer. Marcelino alone is responsible for generating and distributing the productions sheets which are, in effect, employees’ assignments for the day. If she is not going to be there, she makes these assignments in advance.

Other employees do not report to Taylor or Simpson when they are going to be late or absent and neither purported supervisor has the authority to authorize overtime for themselves or for others. Specifically, Taylor testified that he could not decide on his own to stay late to handle a delivery. The record is clear that all employees must consult with and report directly to Marcelino, whether she is present or not. If she is not available, they must escalate their questions or concerns to Carvajal.

I find that the Employer has failed to meet its burden to establish that Simpson and Taylor are supervisors within the meaning of Section 2(11) of the Act. Both employees are appropriately included in the bargaining unit. Since there is no record evidence that any employee has the title Cook Supervisor or Food Service/Utility Supervisor, I find that it is unnecessary to include or exclude those titles in the unit description. If any employees later assume those titles at this location and their duties and responsibilities render them statutory supervisors, their exclusion from the unit would be addressed by the exclusion of “supervisors as defined in the Act.”

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is a domestic corporation with its principal office and place of business located at 2071 Kimberton Road, Kimberton, Pennsylvania, and has been engaged in providing nutritional management services to healthcare and academic entities in various states, including the facility located at 1711 Brookhaven Ave., Far Rockaway, New York. During the past year, a representative period, the Employer provided services valued in excess of \$50,000 to entities located outside the State of New York. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time and per diem Cooks, Dietary Aides and Food Service/Utility Workers employed by the Employer at its 1711 Brookhaven Avenue, Far Rockaway, New York facility but excluding all Food Service

Managers, confidential employees, managers, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by 1199 SEIU United Healthcare Workers East. Ballots and notices in English and Spanish.

A. Election Details

The election will be conducted by United States mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the National Labor Relations Board, Region 29, on April 16, 2021. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 29 office by the close of business on May 7, 2021. However, ballots received in signed envelopes prior to the count will be included in the count. The mail ballots will be counted by video conference on a date and at a time and manner to be determined by the Regional Director after consultation with the parties.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact Marcia Adams via telephone at (718) 765-6177 or via e-mail at marcia.adams@nrlb.gov by no later than 5:00 p.m. on April 26, 2021 in order to arrange for another mail ballot kit to be sent to that employee.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending March 19, 2021 including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by April 5, 2021. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain

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the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: April 1, 2021



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